NO. 46929-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DAVID PALAUKEKALA MAKEKAU,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Suzan Clark, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Makekau was denied his right to a unanimous jury verdict because the state failed to prove the alternative definitions of possession included in the to-convict instruction.

2. Makekau was denied due process because the court entered a judgment against him despite insufficient proof that Makekau committed each alternative of the charged crime.

3. The judgment and sentence contains a scrivener's error as to the date of the jury's verdict.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The to-convict instruction for possession of a stolen motor vehicle stated that the possession element would be satisfied if the jury found that Makekau "knowingly received, possessed, concealed, or disposed of a stolen motor vehicle." But the state did not prove that Makekau either concealed or disposed of the vehicle. Should Makekau's conviction be dismissed because the state failed to prove each alternative means of possession included in the to-convict instruction?

2. Makekau is entitled to a judgment and sentence without scrivener's errors. His judgment and sentence misstates the date of the jury's verdict. Should Makekau's case be remanded to correct the judgment and sentence?

C. STATEMENT OF THE CASE

Grant Daniels owned a yellow 2001 Suzuki DRZ 250 dual sport motorcycle. RP 54-56.[1] Around August 19, 2014,[2] someone stole it from his brother-in-law's home in Washougal. RP 60-61. Daniels reported it as stolen. Id. A few days later, Daniels saw it being ridden in Washougal. RP 61-62. He recognized the motorcycle by stickers he had put on it, specialized tires, and other customized parts. RP 62.

Daniels did not recognize the person riding the motorcycle. RP 64. A helmet concealed the rider's whole face. Daniels described the rider as a tanned, physically fit man wearing a red tank-top. RP 62-63, 66-67. Daniels followed the motorcycle for about five or ten minutes and then called 911. RP 63. The 911 operator told him to pull over and that the police would take over. RP 63. About five minutes later, police officers notified Daniels that they had found the bike and were pursuing it. RP 63-64.

Washougal Officer Tyson Ferguson responded to the call. RP 71, 73. He saw a yellow dual-sport motorcycle turn onto Washougal's main street. RP 72. He approached the motorcycle from behind and observed

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[1] This appeal contains a single volume of verbatim.
[2] The exact date is unclear from the transcript, but Daniels said he reported the motorcycle stolen a few days before the police pursuit, which took place on August 22. RP 94-95.

that the person riding the motorcycle was wearing a red sleeveless t-shirt. RP 74, 88.

Officer Ferguson did not see the rider's face. RP 75, 89. But he described the person riding the motorcycle as a taller man with a muscular build. RP 75. To him, the person riding the motorcycle looked like David Makekau, whom he already knew. RP 75-78.

As the motorcycle began to accelerate away, Officer Ferguson turned on his lights and siren. RP 78. The motorcycle accelerated, drove through a stop sign, and entered a residential area, at which point Officer Ferguson stopped following it. RP 78-79.

Washougal Officer James Powers also responded to the call. RP 95-96. He saw a yellow Suzuki dual-sport motorcycle pass him two or three minutes after the call was dispatched. RP 96. He recognized it as the stolen motorcycle by its license plate—he had taken the stolen vehicle report the day before. RP 96-97.

Officer Powers described the person riding the motorcycle as having a medium to slender build and dark skin tone. RP 97. The rider was wearing a red sleeveless t-shirt and had tattoos on the upper arms. *Id.* Officer Powers could not see the rider's face because the rider was wearing a full face helmet. *Id.* However, he already knew Makekau and, at the time, thought he was the person riding the motorcycle. RP 103-04.

Officer Powers pulled in behind Officer Ferguson, about 200 feet behind the motorcycle. RP 98. He saw the motorcycle accelerate rapidly to about 45 to 50 miles per hour, make a wide turn outside its lane, and go through two stop signs without stopping. RP 100. Officer Powers also stopped following the motorcycle. RP 101.

About a week later, on August 31, Officer Ferguson responded to a disturbance at a home Makekau had connections with and learned that a Hawaiian male named David was leaving the scene. RP 81. As he turned onto a street in front of the residence, he saw Makekau riding towards him on a bicycle, wearing a familiar red sleeveless t-shirt. RP 82. Makekau looked exactly like the person he had seen riding the motorcycle nine days earlier. RP 82.

Officer Ferguson talked to Daniel Vilhauer while at the home. RP 111. Vilhauer said he remembered seeing Makekau with a yellow Suzuki dual-sport motorcycle about a week earlier, and that he had not seen him with that bike before. RP 112. He did not say where he saw Makekau with the motorcycle; he said "it just – he just showed up at the house with it one day." RP 112-13. He did not see Makekau riding it. RP 113.

Vilhauer thought a friend might have lent it to Makekau. RP 112, 114. The motorcycle had been at the home for about three or four days. RP

114. He did not know what happened to it after that, but he thought Makekau mentioned he might have sold it. RP 115.

Officer Ferguson spoke with Makekau. RP 84. He asked him about the motorcycle, and Makekau said he did not know anything about a motorcycle and had not ridden one in several years. RP 84. Officer Ferguson arrested him and placed him in a patrol car. RP 84.

Makekau called Officer Ferguson over to the car and said he was not guilty of anything he was being accused of but that he was willing to work off the charges and had information Officer Ferguson might be interested in. RP 84. Officer Ferguson asked him to be honest about the motorcycle. RP 85. He said he knew Makekau had ridden the stolen motorcycle. *Id.* Makekau said, "I know you're not stupid," and again denied knowing anything about a stolen motorcycle. RP 85.

Officer Ferguson drove Makekau to the Washougal police station. RP 85. He talked to Makekau once he was in a holding cell and said he wanted to get the motorcycle back for the owner's sake. RP 85. Makekau reiterated that he did not know what motorcycle Officer Ferguson was talking about but would make some calls and get the motorcycle back if Officer Ferguson released him. RP 85. Officer Ferguson did not release him. *Id.* The stolen motorcycle was never recovered. RP 85-86.

Makekau was charged with possession of a stolen motor vehicle. CP 1.[3] The information alleged that Makekau

> in the County of Clark, State of Washington, on or about August 22, 2014, did knowingly receive, retain, possess, conceal, or dispose of a stolen motor vehicle, to-wit: a 2001 Suzuki motorcycle, VIN: JS1DJ43A312101172, belonging to Grant Daniels, knowing that this property had been stolen, and did withhold and appropriate this property to the use of a person other than the true owner or person entitled thereto, contrary to Revised Code of Washington 9A.56.068.

CP 1.

At trial, the court gave the following to-convict instruction:

> To convict the defendant of the crime of possessing a stolen motor vehicle, as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about August 22, 2014, the defendant knowingly received, possessed, concealed, or disposed of a stolen motor vehicle;
>
> (2) That the defendant acted with knowledge that the motor vehicle had been stolen;
>
> (3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;
>
> (4) That any of these acts occurred in the State of Washington.

[3] He was also charged with Attempting to Elude a Pursuing Police Vehicle under RCW 46.61.024(1). However, the jury acquitted him of that charge. CP 5.

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

Supplemental Designation of Clerks Papers, Court's Instructions to the Jury (sub. nom. 27), Instruction 11.[4]

The jury began deliberations. About three hours later, it sent a question to the court asking what to do if it could not reach a unanimous verdict. RP 158-59. The court answered that question by stating it should continue to deliberate. *Id.* The jury returned a guilty verdict. RP 160; CP 3. However, it answered "no" on the special verdict form, which asked whether the defendant was using a motor vehicle at the time of the commission of the crime. RP 160; CP 4.

The court sentenced Makekau to 50 months in prison. RP 167. In entering the judgment and sentence, the court noted the jury returned its verdict on October 13, 2014. CP 7.

D. ARGUMENT

Mr. Makekau is entitled to dismissal of his conviction for possessing a stolen vehicle because the state failed to prove each of the

[4] The instruction matched the state's proposed instruction. Supp. DCP (sub. nom 21), Plaintiff's Proposed Instructions to the Jury. Makekau did not propose any instructions. The court read the same to-convict instruction to the jury. RP 134-35.

alternative definitions included in the to-convict instruction. In any event, he is entitled to have the trial court correct a scrivener's error appearing in his judgment and sentence.

1. The trial court deprived Makekau of his right to due process and a unanimous jury verdict by including unproven alternative definitions of possession in the to-convict instruction.

To comply with due process, the state must prove all essential elements of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); U.S. Const. Amend. 14; Wash. Const. Art. I, §§ 3, 21, 22. A fundamental protection accorded to a criminal defendant is that a jury of his peers must unanimously agree on guilt. *State v. Smith*, 159 Wn.2d 778, 783, 155 P.3d 873 (2007). When an element may be established by alternative means, the requirement of unanimity is satisfied so long as sufficient evidence supports each alternative means. *Id.*; *State v. Kitchen*, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988), *abrogated in part on other grounds*, *In Re Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014). An allegation included in the to-convict instruction becomes the law of the case and must be proven by the state beyond a reasonable doubt, like any other element. *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900

(1998); *State v. Lillard*, 122 Wn. App 422, 434-35, 93 P.3d 969 (2004), *review denied*, 152 Wn.2d 1002 (2005); *State v. Hayes*, 164 Wn. App. 459, 481, 262 P.3d 538 (2011).[5]

If any of the alternative means presented to the jury is not supported by substantial evidence, the verdict *must* be vacated unless the reviewing court finds the verdict was based on one alternative that was supported by sufficient evidence. *State v. Rivas*, 97 Wn. App. 349, 351-52, 984 P.2d 432 (1999), *disapproved of on other grounds*, *Smith*, 159 Wn.2d at 778. The remedy for failing to prove an element of the offense—even one included mistakenly in a to-convict instruction—is dismissal of the conviction. *See Hickman*, 135 Wn.2d at 103 (concluding that retrial following reversal for insufficient evidence is "unequivocally prohibited," and dismissal is the appropriate remedy) (quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)).

Lillard and *Hayes* are directly on point. In *Lillard*, the defendant was charged with possession of stolen property under RCW 9A.56.150. *Lillard*, 122 Wn. App. at 434. Under that statute, possession means "knowingly to receive, retain, possess, conceal, or dispose of stolen

[5] The Washington Supreme Court has not yet considered whether unnecessary, alternative definitions included in a to-convict instruction must be treated as alternative means under the law of the case doctrine, as announced in *Lillard* and *Hayes*. *See State v. Owens*, 180 Wn.2d 90, 323 P.3d 1030 (2014) (engaging in alternative means analysis of RCW 9A.82.050(1) (trafficking in stolen property) without considering effect of including alternative definitions in to-convict instruction).

property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1). The trial court's to-convict instruction included all five statutory definitions.

This court concluded that when the trial court includes such alternative definitions in the to-convict instruction, these terms are treated as alternative means that the state must prove beyond a reasonable doubt, unless the verdict was indisputably based "on only one alternative means." *Id.* at 434-35. The *Lillard* court noted that Washington Pattern Jury Instruction (WPIC) for possession of stolen property lists the various alternative definitions of possession in brackets and indicates that the bracketed material is to be used as applicable. *Id.* at 35, n.25. The court also emphasized that although the WPIC's suggestion is "frequently not heeded," it is "better practice to use only the alternative means actually at issue."[6]

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[6] The WPIC's further warn that language enclosed in brackets "may or may not be appropriate for a particular case" and that sometimes pattern instructions include "a series of bracketed terms, and one or more of the terms could be applicable." WPIC 0.10 (Introduction to Washington's Pattern Jury Instructions for Criminal Cases). It warns judges and attorneys to "carefully consider which terms should be included" because "[i]nclusion of terms that do not apply to the facts of a case could *confuse the jury or inadvertently insert unintended issues into the case*." *Id.* (emphasis added); *see also* WPIC 4.20 ("Whenever the definition instruction contains bracketed phrases that relate to various means, methods, or modes of committing the crime, a decision must be made in every case how to treat these alternative methods of committing the crime. Because many statutes list several ways of committing the crime, this problem recurs throughout

In *Hayes*, this court applied the *Lillard* rule in the context of possession of a stolen vehicle, the precise charge at issue in this case. *Hayes*, 164 Wn. App. at 473. The defendant was charged with two counts of possession of a stolen vehicle. *Id.* at 479. The court listed all the alternative definitions of possession in the to-convict instructions for both counts even though the pattern instruction on which that instruction was based includes those terms in brackets. *Id.* at 480. The defendant contended that all five definitions became alternative means for which the state assumed the burden of supplying evidence, as in *Lillard*. *Id.* at 481. The court agreed, treating the alternative definitions of "possession"—specifically "concealment" and "disposal"—as alternative means, "not because they necessarily are alternative means, but because they were listed in the to-convict instructions for the two counts of possession of a stolen vehicle and under *Lillard* the State was obligated to support them with substantial evidence." *Id.* The court concluded that there was not sufficient evidence to prove the defendant "disposed of" one vehicle or

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Volumes 11 and 11A. The committee's intent is to provide pattern instructions that may be used depending on the legal decision made in a particular case.")

that he "concealed" the other and accordingly reversed the convictions on both counts. *Id.*

This case is indistinguishable from *Lillard* and *Hayes*. As in those cases, the court in this case instructed the jury that to convict Makekau of possession of a stolen vehicle the state must prove beyond a reasonable doubt that Makekau knowingly "received, possessed, concealed, or disposed of" the motorcycle. Supp. DCP 34 (sub nom. 27), Instruction 11.[7] By virtue of this instruction, the state took on the obligation to prove each of the listed alternatives by sufficient evidence or to demonstrate that the verdict rested upon a single alternative. *Lillard*, 122 Wn. App. at 434-35; *Rivas*, 97 Wn. App. at 351. Absent a special verdict form for the charge in question—and there was none in this case—the court must presume that the verdict could have rested on any of the alternatives. *State v. Nicholson*, 119 Wn. App. 855, 860, 864, 84 P.3d 877 (2003), *disapproved of in part on other grounds, Smith*, 159 Wn.2d 778.

a. The verdict did not rest on a single alternative.

In this case, there is no way to tell whether the verdict rested on a single alternative. The state's closing argument identified the key issue in the case as identity—whether Makekau was the person riding the motorcycle on August 22. RP 143. The prosecutor argued: "To prove

[7] For some reason, the to-convict instruction omitted the second alternative definition possession, "retaining."

possession of a stolen motor vehicle I have to prove that the—the Defendant knowingly possessed a stolen motor vehicle. So he has to know that he had it. Well, somebody riding a motorcycle obviously knows they have it." RP 143. But the jury appears to have unanimously rejected this theory by finding, in its special verdict, that the defendant was not using a motor vehicle during the commission of the crime. CP 4. It follows that the jury must have found Makekau guilty of possessing a stolen vehicle on some other basis, *e.g.*,by possessing it at a different time, concealing it, or selling it. Jury members might have concluded that Makekau concealed the motorcycle by leaving it at Vilhauer's house. Or they might have concluded that he sold it because Vilhauer said he remembered Makekau might have mentioned that he sold it.

Concealing and selling were not the state's showcase arguments but the state's evidence nonetheless laid out both theories for jury consideration. For these reasons, the state is unable to show that the verdict in this case rested on a single alternative.

b. The state did not prove each alternative beyond a reasonable doubt.

Because the state cannot demonstrate that the verdict rested on a single alternative, it must show that each of the alternatives in the to-convict instruction was proven beyond a reasonable doubt. It cannot do so.

There was insufficient evidence for a jury to conclude that Makekau concealed the stolen motorcycle. The statute does not define what it means to "conceal" property, but this term must mean more than merely possessing or retaining. The dictionary defines "conceal" as:

> To prevent disclosure or recognition of: avoid revelation of: refrain from revealing: withhold knowledge of; draw attention from; treat so as to be unnoticed ... to place out of sight; withdraw from being observed ...

Webster's Third New International Dictionary, 469 (1993).

Vilhauer testified that he arrived home and saw Makekau with a motorcycle. But there was no evidence that Makekau prevented disclosure or recognition of the motorcycle. Vilhauer saw it when he got home. No evidence indicated Makekau removed identifying stickers or customized parts, painted it a different color, or otherwise altered the motorcycle so that it would not be recognizable. RP 111-15. Nor does the mere fact that Makekau had the motorcycle at Vilhauer's home prove he "placed it out of sight."

Likewise, the state failed to present sufficient facts that Makekau disposed of the motorcycle. "Dispose of" means "to transfer into new hands or to the control of someone else." *Webster's Third New International Dictionary*, 654 (2002). At most, the evidence showed that Makekau left the motorcycle at Vilhauer's home. RP 113. Vilhauer's

recollection that he *thought* he remembered Makekau mentioning he *might* have sold it is too speculative to meet the reasonable doubt standard. RP 115.

Makekau was deprived of his right to have every element proven beyond a reasonable doubt and to a unanimous jury verdict. His conviction should be dismissed. *See Hickman*, 135 Wn.2d at 103 (stating dismissal is appropriate remedy when there is insufficient evidence of an unnecessary element included in a to-convict instruction).

2. The trial court should correct the judgment and sentence to reflect the correct verdict date.

Makekau's judgment and sentence contains a scrivener's error that requires correction. Section 2.1 incorrectly notes the jury returned its verdict on October 13, 2014. CP 7. The jury actually returned its verdict on October 14. RP 159. This court should remand Makekau's case to correct the judgment and sentence. *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.3d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence erroneously stating defendant stipulated to an exceptional sentence); *State v. Moten*, 95 Wn. App. 927, 929, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form); *State v. Bahl*, 164 Wn.2d

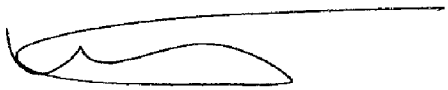
739, 744, 193 P.3d 678 (2008) (illegal or erroneous sentences may be challenged for the first time on appeal).

E. CONCLUSION

Because the state failed to prove each element of possession of a stolen motor vehicle beyond a reasonable doubt, the judgment should be dismissed with prejudice. In any event, the court should remand to the trial court to correct the scrivener's error.

Respectfully submitted on July 30, 2015.

LAW OFFICE OF LISA E. TABBUT



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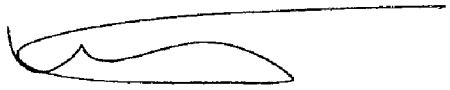
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) the Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to David Palaukekala Makekau/DOC#349526, Larch Corrections Center, 15314 NE Dole Valley Road, Yacolt, WA 98675.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed July 30, 2015 in Winthrop, Washington.



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